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KEATING DENTAL ARTS, INC.

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

13 JAMES R. GLIDEWELL DENTAL  
14 CERAMICS, INC. dba GLIDEWELL  
15 LABORATORIES,  
16 Plaintiff,  
17 v.  
18 KEATING DENTAL ARTS, INC.  
19 Defendant.  
20 AND RELATED COUNTERCLAIMS.  
Civil Action No.  
SACV11-01309-DOC(ANx)  
**STATEMENT OF GENUINE  
DISPUTES OF MATERIAL  
FACT IN SUPPORT OF  
KEATING'S OPPOSITION  
TO GLIDEWELL'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT AS TO  
KEATING'S INVALIDITY  
DEFENSE AND  
COUNTERCLAIM**  
Honorable David O. Carter

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1 Pursuant to Local Rule 56-2, defendant Keating Dental Arts, Inc.  
 2 ("Keating") hereby submits the following Statement of Disputes of Material  
 3 Fact in Support of its Opposition to Plaintiff James R. Glidewell Dental  
 4 Ceramics, Inc. dba Glidewell Laboratories' ("Glidewell") Motion for Partial  
 5 Summary Judgment as to Invalidity Defense and Counterclaim, setting forth  
 6 material facts as to which there is a genuine issue necessary to be litigated.

7 **I. KEATING'S STATEMENT OF GENUINE DISPUTES OF**  
 8 **MATERIAL FACT**

9 Keating submits that material facts preclude partial summary judgment  
 10 regarding its invalidity defense and counterclaim. Keating incorporates by  
 11 reference its Statements of Uncontroverted Facts in support of its Motion for  
 12 Summary Judgment Canceling Glidewell's Trademark Registration (Docket No.  
 13 87).

14 **II. KEATING'S RESPONSE TO GLIDEWELL'S ALLEGED**  
 15 **"UNCONTROVERTED FACTS"**

16 Glidewell's Alleged Undisputed Facts	Keating's Response
17 1. The BruxZir mark is a registered 18 mark. Declaration of Keith Allred In 19 Support Of James R. Glidewell Dental 20 Ceramics, Inc.'s Motion For Summary 21 Judgment ("Allred Decl. ") ¶¶ 3-5; 22 Exhibit 59 to the Appendix of 23 Evidence in Support of James R. 24 Glidewell Dental Ceramics, Inc.'s 25 Motions for Summary Judgment.	UNDISPUTED
26 2. The BruxZir mark was registered 27 on the Principal Register on January	UNDISPUTED

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 19, 2010, as Reg. No. 3,739,663. 3 Allred Decl., ¶¶ 3-5; Exhibit 59 to 4 Appendix of Evidence.	
5 3. The United States Patent and 6 Trademark Office ("PTO") issued the 7 mark without requiring any showing of 8 secondary meaning. Allred Decl., ¶¶ 3- 9 5; Exhibit 60 to Appendix of Evidence.	UNDISPUTED
10 4. In Keating's Petition for 11 Cancellation, Keating admitted that the 12 BruxZir mark is at least "merely 13 descriptive of the goods set forth in 14 [Glidewell's] Registration." Petition for 15 Cancellation, Dkt#58-1, at ¶5. 16 17 18 19 20	DISPUTED Keating's argument in the alternative that BruxZir is generic—and if not generic then merely descriptive lacking secondary meaning—is not considered an admission under FRCP 8(d)(2)-(3). Alternative arguments are acceptable and do not constitute admissions. <i>Maloney v. Scottsdale Ins.</i> <i>Co.</i> , 256 Fed. Appx. 29, 31 (9th Cir. 2007).
21 5. Robert Brandon, Keating's 22 General Manager, admitted at 23 deposition that, as of May 2011, the 24 BruxZir mark (a) was known to be "a 25 specific trade name of a product" and 26 (b) identified a product "made by 27 Glidewell." October 16, 2012 28	DISPUTED Mr. Brandon's comment was directed to Keating's policy after this suit was filed of calling dentists who wrote "bruxzir" on their prescription forms. It did not relate to any action by Keating in May 2011 as Glidewell is

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 Deposition of Robert D. Brandon 3 ("Brandon Depo."); 45:5- 49:2, 4 attached Exhibit 84 to Appendix of 5 Evidence.	now claiming. Mangum Decl., Ex 53 (Brandon Dep. Tr.), at 48:17-20.
6 6. Brandon, who has been with 7 Keating since February of 2003, was 8 the person authorized to verify 9 Keating's interrogatory responses. 10 Brandon Depo at 13: 1 0-14, attached 11 Exhibit 84 to Appendix of Evidence; 12 Defendant's Responses to Plaintiffs 13 First Set of Interrogatories Nos. 1-25, 14 attached as Exhibits 81-82 to 15 Appendix of Evidence.	UNDISPUTED
16 7. Brandon admitted that Keating 17 should have called a doctor, who had 18 submitted a prescription form to 19 Keating requesting BruxZir, to 20 "clarify" whether the doctor "wanted 21 the BruxZir, with a z, or if he wanted- 22 Keating Dental Arts to produce the 23 KDZ Bruxer crown." Brandon Depo at 24 47:17-22, attached Exhibit 84 to 25 Appendix of Evidence.	UNDISPUTED
26 8. Shaun Keating, Keating's founder 27 and CEO, admitted that BruxZir is	DISPUTED 28 Glidewell has taken Mr. Keating's

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 "Glidewell's name for their 3 monolithic crown" and that the word is 4 not "used in any other way in the 5 industry." Keating ("Keating Depo."), 6 at 114:18-115:5, attached Exhibit 85 to 7 Appendix of Evidence. 8 9 10 11 12	statement out of context. When looked at in context it can be seen that his response related to the entire line of questions, not just the one immediately preceding it. When taken in context, it can be seen that Mr. Keating states that BruxZir is not seen by dentists as referring to Glidewell but rather to a "full contoured monolithic zirconia crown for bruxers." (Supp. Jankowski Decl., Exhibit 3).
13 9. [Dentist name redacted] sent 14 Keating a prescription form requesting 15 a "#3 -Bruxzur crown." In response, a 16 Keating employee called [Dentist 17 name redacted] and "explained that 18 [sic] it was a preprietary [sic] name 19 and does he want a keqting [sic] 20 Bruxer." Exhibit 15, KDA3355, 3358, 21 to Appendix of Evidence.	UNDISPUTED
22 10. On March 8, 2012, [Dentist name 23 redacted] sent Keating a prescription 24 form requesting a "BruxZir crown." 25 Exhibit 15, KDA3446, to Appendix of 26 Evidence. 27 28	UNDISPUTED

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 11. A few days later, on March 12, a 3 Keating employee called [Dentist 4 name redacted] and "let her know that 5 the product they specified is a 6 tradename from another lab." Exhibit 7 15, at KDA3444, to Appendix of 8 Evidence	UNDISPUTED
9 12. Practicing dentists located 10 throughout the country have testified 11 that the BruxZir mark is not generic. 12 Declaration of Gregory Doneff, D.D.S., 13 In Support Of James R. Glidewell 14 Dental Ceramics, Inc.'s Motion For 15 Summary Judgment ("Doneff Decl."); 16 Declaration of Thomas E. Bell, 17 D.M.D., In Support Of James R. 18 Glidewell Dental Ceramics, Inc. 's 19 Motion For Summary Judgment ("Bell 20 Decl."); Declaration of Stuart R. 21 Newman, D.D.S., In Support Of James 22 R. Glidewell Dental Ceramics, Inc.'s 23 Motion For Summary Judgment 24 ("Newman Decl."); Declaration of 25 Spencer D. Luke, D.M.D., In Support 26 Of James R. Glidewell Dental 27 Ceramics, Inc.'s Motion For Summary	DISPUTED AND INADMISSIBLE  BruxZir and its phonetic equivalent "bruxer" are used in the dental industry as a generic identifier for all zirconia crowns.  Eggleston Decl., Eggleston Decl., Ex. 65-67; Belton Decl.; Brady Decl.; Campbell Decl.; Colleran Decl.; Jacquinot Decl.; Murphy Decl.; Myers Decl.; Nussear Decl.; Richardson Decl.; Scott Decl.; Stephens Decl.; Sweet Decl.; Tobin Decl.; Frattura Decl.; Ex. A.  Hearsay (Fed. R. Evid. 802), The dentist testimony is an out of court statement offered to prove the truth of

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1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 Judgment ("Luke Decl."); Declaration 3 of Howard S. Cohen, D.D.S., In 4 Support Of James R. Glidewell Dental 5 Ceramics, Inc.'s Motion For Summary 6 Judgment ("Cohen Decl."); 7 Declaration of Terence J. Michiels, 8 D.D.S., In Support Of James R. 9 Glidewell Dental Ceramics, Inc.'s 10 Motion For Summary Judgment 11 ("Michiels Decl."); Declaration of 12 Kent J. Toca, D.D.S., In Support Of 13 James R. Glidewell Dental Ceramics, 14 Inc.'s Motion For Summary Judgment 15 ("Toca Decl.").	the matter asserted; Lacks Factual Foundation (FRE 602)  The entirety of the evidence cited by Glidewell in support of SUF 12 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to dentist declarations Doneff, Bell, Newman, Luke, Cohen, Michiels and Toca) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.
16 13. Dr. Doneff testifies: "[s]ince 17 learning about Glidewell Labs's 18 BRUXZIR brand zirconia crowns and 19 bridges in 2009 and through the date of 20 this declaration, I have known, and 21 through various communications with 22 other dentists, I am aware that other 23 dentists have known, that the 24 BRUXZIR mark is a brand or 25 trademark that signifies a single source 26 of zirconia crowns and bridges and the 27 zirconia material from which those	DISPUTED AND INADMISSIBLE  The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep.

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1 Glidewell's Alleged Undisputed Facts	Keating's Response
<p>2 products are made. Since learning  3 about Glidewell Labs's BRUXZIR  4 brand zirconia crowns and bridges in  5 2009 and through the date of this  6 declaration, I have known, and through  7 my various communications with other  8 dentists, I am aware that other dentists  9 have known, that the BRUXZIR mark  10 is a brand or trademark associated with  11 Glidewell Labs." This testimony of Dr.  12 Doneffs is representative of the  13 testimonies of Dr. Bell, Dr. Newman,  14 Dr. Luke, Dr. Cohen, Dr. Michiels,  15 and Dr. Toca. Doneff Decl., ¶ 4; Bell  16 Decl., ¶ 4; Newman Decl., ¶ 4; Luke  17 Decl., ¶ 4; Cohen Decl., ¶ 4; Michiels  18 Decl., ¶ 4; Toca Del. ¶ 4.</p>	<p>Tr.), at 141:10 – 143:8; Jankowski  Decl., Ex. 5 (Bartolo Dep. Tr.), at  178:11-22, 135:11 – 134:19; Eggleston  Decl., Ex. 67, at 3:7 – 5:15.</p> <p>Hearsay (Fed. R. Evid. 802), Doneff's  testimony as to the statements and  knowledge of other dentists is an out  of court statement offered to prove the  truth of the matter asserted;  Speculation (FRE 602); and Lacks  Factual Foundation (FRE 602)</p> <p>The entirety of the evidence cited by  Glidewell in support of SUF 13 is  inadmissible as outlined in Keating's  Objections To Evidence Submitted  With Glidewell's Motions For Partial  Summary Judgment (objections to  dentist declarations Doneff, Bell,  Newman, Luke, Cohen, Michiels and  Toca) (filed herewith). The evidence  was untimely and therefore under  FRCP 37(c) should be excluded.</p>

1 Glidewell's Alleged Undisputed Facts	Keating's Response
<p>2 14. Dr. Doneff also testifies that: "Both  3 before and after September 2010, I,  4 and other dentists with whom I  5 regularly communicate, use the term  6 "bruxer" exclusively to refer to a  7 person who suffers from bruxism; i.e.,  8 habitual and destructive grinding of the  9 teeth and clenching of the jaw. Both  10 before and after September 2010, the  11 terms "bruxer," "bruxer crown,"  12 "bruxzir," and "bruxzir crown" are not  13 terms that I, nor the dentists I  14 communicate with, use to refer to  15 zirconia crowns and bridges as a type  16 or category of product. I have never  17 used any of these terms to refer to  18 zirconia crowns or bridges as a type or  19 category of product, and I have never  20 heard any other dentist use any of  21 those terms for that purpose. Rather,  22 both before and after I learned about  23 Glidewell Labs's BRUXZIR brand  24 zirconia crowns and bridges in 2009,  25 when referring to zirconia crowns and  26 bridges as a type or category of  27 product generally, I, and the dentists</p>	<p>DISPUTED AND INADMISSIBLE</p> <p>Many dentists in the industry refer to all-zirconia crowns as a "BruxZir," "bruxzir," or variations thereon. Eggleston Decl., Ex. 65 at 16-18; Ex. 66 at 3-7.</p> <p>Hearsay (Fed. R. Evid. 802), Doneff's testimony as to the statements and knowledge of other dentists is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)</p> <p>The entirety of the evidence cited by Glidewell in support of SUF 14 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to dentist declarations Doneff, Bell, Newman, Luke, Cohen, Michiels and Toca) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.</p>

Glidewell's Alleged Undisputed Facts	Keating's Response
<p>1 that I communicate with, use the terms  2 "zirconia crowns," "all zirconia  3 crowns," "monolithic zirconia  4 crowns," "full zirconia crowns," or  5 "solid zirconia crowns." This  6 testimony of Dr. Doneff is  7 representative of the testimonies of Dr.  8 Bell, Dr. Newman, Dr. Luke, Dr.  9 Cohen, Dr. Michiels, and Dr. Toca.  10 Doneff Decl., ¶¶ 7-8; Bell Decl., ¶¶ 7-  11 8; Newman Decl., ¶¶ 7-8; Luke Decl.,  12 ¶¶7-8; Cohen Decl., ¶¶ 7-8; Michiels  13 Decl., ¶¶ 7-8; Toca Decl., ¶¶ 7-8.  14</p>	
<p>15</p> <p>16 15. Jim Shuck, Glidewell's Vice  17 President of Sales and Marketing, and  18 a thirty-six year veteran of the dental  19 industry, testifies that "[t]he generic  20 terms for a BruxZir brand crown are  21 'crown,' 'crown for bruxers,' or 'all  22 zirconia crown.' I have also heard a  23 'solid zirconia crown,' and a 'full  24 contour zirconia crown.' The term  25 'bruxzir' is not used by Glidewell- or,  26 to my knowledge, widely or generally  27 used by anyone else - to refer to solid</p>	<p>DISPUTED</p> <p>Many dentists in the industry refer to all-zirconia crowns as a "BruxZir," "bruxzir," or variations thereon. Eggleston Decl., Ex. 65 at 16-18; Ex. 66 at 3-7.</p> <p>Hearsay (Fed. R. Evid. 802), Shuck's testimony as to the statements of other dentists is an out of court statement offered to prove the truth of the matter</p>

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 zirconia crowns." Declaration of 3 James Shuck In Support Of James R. 4 Glidewell Dental Ceramics, Inc.'s 5 Motion For Summary Judgment 6 ("Shuck Decl.") ¶ 14	asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)
7 16. Dr. Michel DiTolla, Glidewell's 8 Director of Clinical Education & 9 Research, and a practicing dentist 10 since 1988, testifies that he directly 11 interacts with two to three thousand 12 dentists per year, the vast majority of 13 which "have made statements ... 14 indicating that they understand that 15 BruxZir identifies Glidewell as the 16 source of the crown products." 17 Declaration of Dr. Michel C. DiTolla 18 In Support Of James R. Glidewell 19 Dental Ceramics, Inc.'s Motion For 20 Summary Judgment ("DiTolla Decl. ") 21 ¶ 11	DISPUTED The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
	Hearsay (Fed. R. Evid. 802), DiTolla's testimony as to the statements and knowledge of other dentists is an out of court statement offered to prove the truth of the matter asserted;

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2		Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)
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5	17. Dr. DiTolla testifies, "when referring generally to a zirconia crown, dentists refer to the crown as a zirconia crown." DiTolla Decl. ¶ 11.	DISPUTED
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21	18. Dr. DiTolla further testifies that, in	DISPUTED
22	his 24 years as a dentist, he has never	
23	used the term "bruxer" to commonly	
24	refer to crowns, and that he has never	
25	heard any of the thousands of dentists	
26	he interacts with each year use the	
27	term "bruxer" to commonly refer to	
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1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 9 10 11	crowns. DiTolla Decl. ¶ 12.	119; Eggleston Decl., Ex. 108; Eggleston Decl., Ex. 120.  Hearsay (Fed. R. Evid. 802), DiTolla's testimony as to the statements and knowledge of other dentists is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)
12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	19. Dr. DiTolla opines that "bruxer" is not a commonly used term in the dental field for crowns. Instead, the term 'bruxer' refers to an individual who suffers from bruxism (i.e. grinds his or her teeth)." DiTolla Decl. ¶ 12.	"Bruxer" is used in the dental industry to refer to crowns. Boatright Decl., Ex. A ¶ 51; Boatright Decl., Ex. A ¶ 27 (First video link); Eggleston Decl., Ex. 65, at 17:3-8; Eggleston Decl., Ex. 119; Eggleston Decl., Ex. 108; Eggleston Decl., Ex. 120.  Hearsay (Fed. R. Evid. 802), DiTolla's testimony as to the statements and knowledge of other dentists is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 20. Rudy Ramirez, Glidewell's General 3 Manager of the Fixed Prosthodontics, 4 testifies that each of the more than 100 5 dentists that he has personally guided 6 on tours of Glidewell's production 7 facility have "expressed ... their 8 awareness that Glidewell is the source 9 for zirconia crowns and bridges 10 produced and marketed under the 11 BruxZir mark." Declaration of Rudy 12 Ramirez In Support Of James R. 13 Glidewell Dental Ceramics, Inc.'s 14 Motion For Summary Judgment 15 ("Ramirez Decl.") ¶ 6. 16	DISPUTED AND INADMISSIBLE  The entirety of Glidewell SUF ¶ 20 relies on inadmissible hearsay (Fed. R. Evid. 802)—Ramirez's testimony as to the statements and knowledge of other dentists is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)
17 21. Robin Bartolo, Sales Manager for 18 Glidewell Direct, who has actively 19 participated in seventeen trade shows - 20 attended by many thousands of dentists 21 in total- since January of 2009, testifies 22 that: "through [his] various 23 communications with dentists and 24 dental lab representatives at trade 25 shows, [he is] aware that dentists and 26 dental lab representatives generally are 27 aware that the BruxZir mark is a brand	DISPUTED  The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137;

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1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	<p>or trademark that signifies a single source of zirconia crowns and bridges and the zirconia material from which those products are made." Declaration of Robin Bartolo In Support Of James R. Glidewell Dental Ceramics, Inc.'s Motion For Summary Judgment ("Bartolo Decl. ") ¶ 5.</p>	<p>Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.</p> <p>Hearsay (Fed. R. Evid. 802), Bartolo's testimony as to the statements and knowledge of dentists and dental lab representatives is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)</p>
17 18 19 20 21 22 23 24 25 26 27 28	<p>22. Dr. Ronald Goldstein opines that "dentists do not refer to solid zirconia crowns as 'bruxers' or 'bruxer crowns,'" and that "dentists do not understand the mark BruxZir to refer to solid zirconia crowns from any source, but rather ... dentists understand the mark BruxZir to identify the source of solid zirconia crowns and material to make solid zirconia crowns - the solid zirconia crowns supplied by</p>	<p><b>DISPUTED AND INADMISSIBLE</b></p> <p>The entirety of the evidence cited by Glidewell in support of SUF 14 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to Goldstein's declaration) (filed herewith). The evidence was untimely and therefore under FRCP 37(c)</p>

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 Glidewell." Declaration of Dr. Ronald 3 Goldstein In Support Of James R. 4 Glidewell Dental Ceramics, Inc.'s 5 Motion For Summary Judgment 6 ("Goldstein Decl.") ¶ 9. 7 8 9 10 11 12 13 14 15 16 17 18	should be excluded.  The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
19 23. Professor David Franklyn opines 20 that "Glidewell's BruxZir mark is not 21 generic but rather is a suggestive mark, 22 and that, in any event, the BruxZir 23 trade mark has strong brand 24 recognition amongst United States 25 dentists as a unique source identifier 26 for full zirconia dental crowns made 27 by Glidewell." Declaration of David 28	DISPUTED AND INADMISSIBLE  The entirety of the evidence cited by Glidewell in support of SUF 23 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objection to Franklyn's declaration) filed herewith.

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	Franklyn In Support Of James R. Glidewell Dental Ceramics, Inc.'s Motion For Summary Judgment ("Franklyn Decl.") ¶ 71.	BruxZir is not suggestive, but rather is generic or at least highly descriptive because "Brux" describes the intended user and "Zir" describes zirconia and both of these are understood by dentists as such. Glidewell selected this name because it is descriptive of the user and material.  Mangum Decl., Ex. 50 (Shuck Dep. Tr.) at 41:1-13; <i>see also</i> Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4.; Jankowski Decl., Ex. 18; Ex. 4 (DiTolla Dep. Tr.) at 85:15-87:5; Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4; Jankowski Decl., Ex. 3 at 6; Eggleston Decl., Ex. 65 at 16-18; Ex. 66 at 3-7 ; (Belton Decl., ¶¶ 9-11; Brady Decl., ¶¶ 9-11; Campbell Decl., ¶¶ 10-12; Colleran Decl. ¶¶ 10-12; Jacquinot Decl., ¶¶ 9-10; Murphy Decl., ¶¶ 9-11; Myers Decl., ¶¶ 9-10; Nussear Decl., ¶¶ 9-11; Richardson Decl., ¶ 10-12; Scott Decl., ¶¶ 9-11; Stephens Decl., ¶¶ 10-12; Sweet Decl., ¶¶ 8-10; Tobin Decl., ¶¶ 9-11.)

1 Glidewell's Alleged Undisputed Facts	Keating's Response
	<p data-bbox="910 270 1432 306">(Frattura Decl., ¶¶ 7-9, 18; Ex. A.)</p> <p data-bbox="910 397 1503 614">The BruxZir mark has not achieved widespread recognition among dentists in the U.S. rather it is used as a generic term for all zirconia crowns.</p> <p data-bbox="910 650 1503 1136">Eggleston Decl., Eggleston Decl., Ex. 65-67; Belton Decl.; Brady Decl.; Campbell Decl.; Colleran Decl.; Jacquinot Decl.; Murphy Decl.; Myers Decl.; Nussear Decl.; Richardson Decl.; Scott Decl.; Stephens Decl.; Sweet Decl.; Tobin Decl.; Frattura Decl.; Ex. A.</p>
<p data-bbox="208 1235 894 1902">24. The BruxZir mark is a combination of "brux" and "zir." "Brux" suggests to relevant consumers (dentists) that BruxZir brand products are strong and durable, and are suitable for use in applications requiring superior strength and durability, such as for treating patients with bruxism. Shuck Decl., ¶ 9; DiTolla Decl., ¶ 14; Ramirez Decl., ¶ 4; Goldstein Decl., ¶ 17; Franklyn Decl. ¶ 42.</p>	<p data-bbox="910 1235 1095 1271">17 DISPUTED</p> <p data-bbox="910 1362 1503 1839">BruxZir is not suggestive, but rather is generic or at least highly descriptive because "Brux" describes the intended user and "Zir" describes zirconia and both of these are understood by dentists as such. Glidewell selected this name because it is descriptive of the user and material.</p> <p data-bbox="910 1875 1503 1911">28 Mangum Decl., Ex. 50 (Shuck Dep.</p>

Glidewell's Alleged Undisputed Facts	Keating's Response
	<p>Tr.) at 41:1-13; <i>see also</i> Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4.; Jankowski Decl., Ex. 18; Ex. 4 (DiTolla Dep. Tr.) at 85:15-87:5; Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4; Jankowski Decl., Ex. 3 at 6; Eggleston Decl., Ex. 65 at 16-18; Ex. 66 at 3-7 ; (Belton Decl., ¶¶ 9-11; Brady Decl., ¶¶ 9-11; Campbell Decl., ¶¶ 10-12; Colleran Decl. ¶¶ 10-12; Jacquinot Decl., ¶¶ 9-10; Murphy Decl., ¶¶ 9-11; Myers Decl., ¶¶ 9-10; Nussear Decl., ¶¶ 9-11; Richardson Decl., ¶ 10-12; Scott Decl., ¶¶ 9-11; Stephens Decl., ¶¶ 10-12; Sweet Decl., ¶¶ 8-10; Tobin Decl., ¶¶ 9-11.) (Frattura Decl., ¶¶ 7-9, 18; Ex. A.)</p>
	<p>Glidewell's SUF 24 relies on the inadmissible declarations of Goldstein and Franklyn, as objected to in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objection to Goldstein's declaration) and (objection to Franklyn's</p>

Glidewell's Alleged Undisputed Facts	Keating's Response
	declaration) (filed herewith). Goldstein's evidence was untimely and therefore under FRCP 37(c) should be excluded.
25. "Zir" suggests that the products comprise zirconia, a hard and durable material successfully used in dental products. Shuck Decl., ¶ 9; DiTolla Decl., ¶ 14; Ramirez Decl., ¶ 4; Goldstein Decl., ¶ 17; Franklyn Decl. ¶ 42.	DISPUTED  BruxZir is not suggestive, but rather is generic or at least highly descriptive because "Brux" describes the intended user and "Zir" describes zirconia and both of these are understood by dentists as such. Glidewell selected this name because it is descriptive of the user and material.  Mangum Decl., Ex. 50 (Shuck Dep. Tr.) at 41:1-13; <i>see also</i> Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4.; Jankowski Decl., Ex. 18; Ex. 4 (DiTolla Dep. Tr.) at 85:15-87:5; Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4; Jankowski Decl., Ex. 3 at 6; Eggleston Decl., Ex. 65 at 16-18; Ex. 66 at 3-7 ; (Belton Decl., ¶¶ 9-11; Brady Decl., ¶¶ 9-11; Campbell Decl., ¶¶ 10-12; Colleran Decl. ¶¶ 10-12; Jacquinot Decl., ¶¶ 9-10; Murphy

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21		<p>Decl., ¶¶ 9-11; Myers Decl., ¶¶ 9-10; Nussear Decl., ¶¶ 9-11; Richardson Decl., ¶ 10-12; Scott Decl., ¶¶ 9-11; Stephens Decl., ¶¶ 10-12; Sweet Decl., ¶¶ 8-10; Tobin Decl., ¶¶ 9-11.) (Frattura Decl., ¶¶ 7-9, 18; Ex. A.)</p> <p>Glidewell's SUF 25 relies on the inadmissible declarations of Goldstein and Franklyn, as objected to in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to Goldstein's declaration) and (objections to Franklyn's declaration) (filed herewith). Goldstein's evidence was untimely and therefore under FRCP 37(c) should be excluded.</p>
22 23 24 25 26 27 28	26. Multiple medical and dental dictionaries provide no definition for "bruxzir" (or for "bruxer"). DiTolla Decl., ¶ 12; Exhibit 75 to Appendix of Evidence.	UNDISPUTED

Glidewell's Alleged Undisputed Facts	Keating's Response
27. Keating's advertisement introducing the KDZ Bruxer brand product states, under a large color photograph of several zirconia crowns and bridges, "Introducing the All-New KDZ Bruxer. The Best Full-Contour Zirconia Restorations Available." Exhibit 20, (KDA000854) to Appendix of Evidence.	UNDISPUTED
28. The advertisement goes on to say that "KDZ Bruxer is the ideal combination of strength and esthetics for your posterior crowns and bridges." Exhibit 20 (KDA000854) to Appendix of Evidence.	UNDISPUTED
29. Drake Precision Laboratory advertises its zirconia crown using the mark ZIR-CAST. Exhibit 23 (KDA-002448) to Appendix of Evidence.	UNDISPUTED
21 30. Drake describes its product with such terms as "all-ceramic," "solid zirconia," "high translucency zirconia," "monolithic," "nonmetallic," etc. Exhibit 23 (KDA-002448) to Appendix of Evidence.	UNDISPUTED

Glidewell's Alleged Undisputed Facts	Keating's Response
<p>31. Keating's advertising materials demonstrate that Keating can, and does, describe its products using a variety of alternative words and phrases such as "dental zirconia," "medical grade zirconia ... for posterior single units and bridges," "full contour zirconia," "alternative to full-cast gold," "full contour zirconia restoration," "for patients who grind or lack preparation space or porcelain," etc. Exhibit 16 (KDA 00843, 00851-00854) to Appendix of Evidence.</p>	UNDISPUTED
<p>32. Prior to Glidewell's introduction of its BruxZir brand products, neither "bruxzir" nor "bruxer" had previously been used for the same or similar products. DiTolla Decl., ¶ 17; Goldstein Decl., ¶¶ 12-14; Doneff Decl., ¶ 8; Bell Decl., ¶ 8; Newman Decl., ¶ 8; Luke Decl., ¶ 8; Cohen Decl. ¶ 8; Michiels Decl. ¶ 8; Toca Decl. ¶ 8.</p>	<p>DISPUTED</p> <p>Several marks similar to "bruxzir" or "bruxer" have been used prior to Glidewell's introduction of its BruxZir brand products, including but not necessarily limited to: BRUX-EZE (1990), BRUXGARD (1999), BRUXGUARD (1999), BRUX-GARD (1999), BRUXCARE (2000), Request for Judicial Notice., Ex. F, G, H.</p> <p>Glidewell's SUF 32 relies on the</p>

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 9 10 11 12 13		inadmissible declarations of Goldstein Doneff, Bell, Newman, Luke, Cohen, Michiels, and Toca, as objected to in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objection to Goldstein's declaration) and (objection to dentist declarations) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.
14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	33. Actual purchasers associate the BurxZir mark with Glidewell. These include Doctors Doneff, Bell, Newman, Luke, Cohen, Michiels, and Toca. Doneff Decl., ¶¶ 3-6, 9-10; Bell Decl., ¶¶ 3-6, 9-10; Newman Decl., ¶¶ 3-6, 9-10; Luke Decl., ¶¶ 3-6, 9-10; Cohen Decl., ¶¶ 3-6, 9-10; Michiels Decl., ¶¶ 3-6, 9-10; Toca Decl., ¶¶ 3-6, 9-10.	INADMISSIBLE  Glidewell cites to no admissible evidence that its BruxZir dental restoration products have received wide recognition or acclaim. Rather, dentists do not associate the name BruxZir with a dental restoration associated with Glidewell.  Eggleston Decl., Eggleston Decl., Ex. 65-67; Belton Decl., ¶¶ 9-11; Brady Decl., ¶¶ 9-11; Campbell Decl., ¶¶ 10-12; Colleran Decl. ¶¶ 10-12; Jacquinot

Glidewell's Alleged Undisputed Facts	Keating's Response
	<p>Decl., ¶¶ 9-10; Murphy Decl., ¶¶ 9-11; Myers Decl., ¶¶ 9-10; Nussear Decl., ¶¶ 9-11; Richardson Decl., ¶ 10-12; Scott Decl., ¶¶ 9-11; Stephens Decl., ¶¶ 10-12; Sweet Decl., ¶¶ 8-10; Tobin Decl., ¶¶ 9-11.</p> <p>The entirety of the evidence cited by Glidewell in support of SUF 33 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to dentist declarations Doneff, Bell, Newman, Luke, Cohen, Michiels and Toca) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.</p>
34. Dr. Doneff states: "Since learning about Glidewell Labs's BRUXZIR brand zirconia crowns and bridges in 2009 and through the date of this declaration, I have known, and through various communications with other dentists, I am aware that other dentists	<p><b>DISPUTED AND INADMISSIBLE</b></p> <p>The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15;</p>

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 have known, that the BRUXZIR mark 3 is a brand or trademark that signifies 4 that Glidewell Labs is the source of 5 zirconia crowns and bridges marketed 6 under that trademark." This testimony 7 of Dr. Doneff is representative of the 8 testimonies of Dr. Bell, Dr. Newman, 9 Dr. Luke, Dr. Cohen, Dr. Michiels, 10 and Dr. Toca. Doneff Decl., ¶ 5; Bell 11 Decl., ¶ 5; Newman Decl., ¶ 5; Luke 12 Decl., ¶ 5; Cohen Decl., ¶ 5; Michiels 13 Decl., ¶ 5; Toca Decl., ¶ 5.	Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
14 15 16 17 18 19 20 21 22 23 24 25 26 27	Hearsay (Fed. R. Evid. 802), Doneff's testimony as to the statements and knowledge of dentists is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)
28	The entirety of the evidence cited by Glidewell in support of SUF 34 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to dentist declarations Doneff, Bell, Newman, Luke, Cohen, Michiels and

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4		Toca) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.
5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	35. Dr. Doneff also states: "Since learning about Glidewell Labs's BRUXZIR brand zirconia crowns and bridges in 2009 and through the date of this declaration, I have often used the term BRUXZIR to identify zirconia crowns and bridges manufactured by Glidewell Labs, because I understand that the BRUXZIR mark is a brand or trademark that signifies that Glidewell Labs is the source of zirconia crowns and bridges marketed under that trademark." This testimony of Dr. Doneff is representative of the testimonies of Dr. Bell, Dr. Newman, Dr. Luke, Dr. Cohen, Dr. Michiels, and Dr. Toca. Doneff Decl., ¶ 9; Bell Decl., ¶9; Newman Decl., ¶ 9; Luke Decl., ¶ 9; Cohen Decl., ¶ 9; Michiels Decl., ¶ 9; Toca Decl., ¶ 9.	<p><b>DISPUTED AND INADMISSIBLE</b></p> <p>The entirety of the evidence cited by Glidewell in support of SUF 35 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to dentist declarations Doneff, Bell, Newman, Luke, Cohen, Michiels and Toca) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.</p> <p>The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137;</p>

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2		Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
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8	36. Dr. DiTolla testifies that he directly interacts with two to three thousand dentists per year, the vast majority of which "have made statements ... indicating that they understand that BruxZir identifies Glidewell as the source of the crown products. DiTolla Decl., ¶ 11.	DISPUTED AND INADMISSIBLE
9		The entirety of Glidewell SUF ¶ 36 relies on inadmissible hearsay (Fed. R. Evid. 802)—DiTolla's testimony as to the statements and knowledge of other dentists is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)
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1 Glidewell's Alleged Undisputed Facts	Keating's Response
	136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 37. Rudy Ramirez testifies that each of the more than 100 dentists that he has personally guided on tours of Glidewell's production facility have "expressed ... their awareness that Glidewell is the source for zirconia crowns and bridges produced and marketed under the BruxZir mark. " Ramirez Decl., ¶7.	DISPUTED AND INADMISSIBLE  The entirety of Glidewell SUF ¶ 37 relies on inadmissible hearsay (Fed. R. Evid. 802)—Ramirez's testimony as to the statements and knowledge of dentists is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)
	The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex.

Glidewell's Alleged Undisputed Facts	Keating's Response
	136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
8        38. Robin Bartolo, who has actively 9        participated in seventeen trade shows - 10        attended by many thousands of dentists 11        in total- since January of 2009, testifies 12        that: "through [his] various 13        communications with dentists and 14        dental lab representatives at trade 15        shows, [he is] aware that dentists and 16        dental lab representatives generally are 17        aware that the BruxZir mark is a brand 18        or trademark that signifies a single 19        source of zirconia crowns and bridges 20        and the zirconia material from which 21        those products are made." Bartolo 22        Decl., ¶ 5. 23 24 25 26 27	<p>DISPUTED AND INADMISSIBLE</p> <p>The entirety of Glidewell SUF ¶ 37 relies on inadmissible hearsay (Fed. R. Evid. 802)—Bartolo's testimony as to the statements and knowledge of dentists and dental lab representatives is an out of court statement offered to prove the truth of the matter asserted; Speculation (FRE 602); and Lacks Factual Foundation (FRE 602)</p> <p>The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex.</p>

Glidewell's Alleged Undisputed Facts	Keating's Response
	136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
9 39. As part of the initial launch, 10 Glidewell sent direct mail pieces for 11 dentists, mailed samples of BruxZir 12 brand products to current customers, 13 sent email blasts to 125,000 dentists 14 through the American Dental 15 Association's dentist listing, produced 16 and posted educational videos online, 17 and announced continuing education 18 programs for the product. Shuck 19 Decl., ¶ 7.	UNDISPUTED
20 40. Since the introduction of BruxZir 21 brand products, Glidewell has 22 consistently and regularly advertised 23 the brand, in association with the 24 Glidewell Labs name, in a wide variety 25 of ways, including via the company's 26 website (www.bruxzir.com) and blog, 27 press releases, patient and doctor	DISPUTED  Keating does not dispute that the BruxZir mark has been widely advertised however the undisputed evidence establishes that it is not necessarily advertised in association with Glidewell Labs. Jankowski Decl.,

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	<p>education brochures, videos, advertisements in dental publications, direct mailers, email blasts, and trade shows. Shuck Decl., ¶ 20; Exhibits 9-14, 17-19, 21-22, and 24-25 to the Appendix of Evidence.</p>	<p>Ex 11 at 3-6; Jankowski Decl., Ex. 10 at 1-32; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15; Boatright Decl., Ex. A ¶¶ 27,51; Jankowski Decl., Ex. 4 (DiTolla Dep. Tr.), at 224:13 – 226:6; Eggleston Decl., Ex. 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19;</p>
20 21 22 23 24 25 26 27 28	<p>41. BruxZir.com received approximately 289,210 unique page views between October 2009 and November 2012, with 78% of this volume from U.S. traffic. Shuck Decl., ¶ 21.</p>	UNDISPUTED

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 42. Glidewell regularly and 3 consistently advertises the BruxZir 4 brand product line in dental industry 5 publications, including <i>ADA News</i> , 6 <i>Chairside Magazine</i> , <i>Dental</i> 7 <i>Economics</i> , <i>Dental Lab Reports</i> , 8 <i>Dentaltown</i> , <i>Dental Tribune</i> , <i>Dentistry</i> 9 <i>Today</i> , <i>Inclusive Magazine</i> , the 10 <i>Journal of Dental Technology</i> , and 11 <i>Lab Management Today</i> . Shuck Decl., 12 ¶ 22; DiTolla Decl., ¶¶ 6-7; Exhibits 13 21-22 to the Appendix of Evidence.	UNDISPUTED
14 43. Glidewell consistently sends out e- 15 mail blasts approximately quarterly to 16 U.S. dentists and dental laboratories, 17 advertising Glidewell's BruxZir 18 branded product line. Shuck Decl., ¶ 19 23.	UNDISPUTED
20 44. These e-mail blasts are sent to 21 Glidewell's internal e-mail list, which 22 contains approximately 24,000 23 dentists, and to the American Dental 24 Association's e-mail list, which has 25 about 89,000 dentists. Shuck Decl., ¶ 26 23. 27	UNDISPUTED

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1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 45. Glidewell consistently conducts 3 quarterly direct mail advertising for 4 BruxZir branded crowns. For this 5 direct mail advertising, Glidewell uses 6 a list, purchased from the American 7 Dental Association, of approximately 8 125,000 dentists. Shuck Decl., ¶ 24.	UNDISPUTED
9 46. Glidewell personnel regularly and 10 consistently attend dozens of trade 11 shows and conventions per year 12 around the country. Shuck Decl., ¶ 26.	UNDISPUTED
13 14 47. At these conventions and trade 15 shows, which are attended by, in the 16 aggregate, thousands of dentists, 17 Glidewell consistently and 18 prominently displays the BruxZir 19 brand, in association with the 20 Glidewell Labs name, in a wide variety 21 of contexts, including on the booth, the 22 signage, in brochures, takeaways, and 23 product displays and demonstrations. 24 Shuck Decl., ¶ 26.	UNDISPUTED
25 26 27 48. As part of Glidewell's marketing efforts for the BruxZir brand, Glidewell's Director of Clinical	UNDISPUTED

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 Education and Research, Dr. DiTolla, 3 made a series of educational videos in 4 2009 and 2010, and he made a 5 compendium of all videos with a new 6 introduction in 2011. Shuck Decl., ¶ 7 27; DiTolla Decl., ¶¶ 4-5; Exhibit 73 8 to the Evidence of Appendix.	
9 49. The videos explain and illustrate 10 various features and benefits of 11 BruxZir brand products, and 12 prominently feature the BruxZir brand 13 in association with the Glidewell Labs 14 name. Shuck Decl., ¶ 27.	DISPUTED  Keating disputes Glidewell's use of the word "prominently" as being vague.  This is improper fact witness opinion testimony. (FRE 701)
16 50. The videos are publicly available 17 on Glidewell's website and YouTube 18 channel, and the video pages have had 19 approximately 30,000 unique page 20 views between October 2009 and 21 November 2012. Shuck Decl., ¶ 27.	UNDISPUTED
23 51. Glidewell personnel, including Dr. 24 DiTolla and Robin Carden (Vice 25 President of Research and 26 Development) regularly publish 27 articles and give presentations that	UNDISPUTED

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 prominently feature the BurxZir brand in association with the Glidewell Labs name. Shuck Decl., ¶¶ 28-29; DiTolla Decl., ¶¶ 4-10; Carden Decl., ¶¶ 3-6, 11-15; Exhibits 21-22, 24-25, 53-57, 67, and 73 to the Appendix of Evidence.	
9 10 11 12 13 14 15 16 52. The BruxZir brand and BruxZir brand products have garnered substantial third party recognition in the form of, for example, awards and laudatory press coverage. Shuck Decl., ¶¶ 30-36; Carden Decl., ¶ 15; Exhibits 26-38, and 41-45 to the Appendix of Evidence.	DISPUTED  While Keating recognizes that Glidewell has been recognized by third parties in the form of awards and press coverage, the use of "substantial" is vague and therefore disputed.
17 18 19 20 21 22 23 24 25 53. Glidewell's total marketing expenses for the BruxZir brand product line from June 2009 through June 2012 are approximately [Sales data redacted], which represents approximately 12% of Glidewell's overall marketing budget. Shuck Decl., ¶¶ 38-41; Exhibit 46 to the Appendix of Evidence.	UNDISPUTED
26 27 54. Of this figure, approximately two thirds, or [Sales data redacted], was	UNDISPUTED

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6	directed to advertising and marketing BruxZir brand finished crowns and bridges. Shuck Decl., ¶¶ 38-41; Exhibit 46 to the Appendix of Evidence.	
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	55. Glidewell's extensive promotion of the BruxZir mark has been successful in cementing in the minds of dentists a strong association between the mark and Glidewell as the source of BruxZir brand dental restoration products. Doneff Decl., ¶¶ 3-4, 10; Bell Decl., ¶¶ 3-4, 10; Newman Decl., ¶¶ 3-4, 10; Luke Decl., ¶¶ 3-4, 10; Cohen Decl., ¶¶ 3-4, 10; Michiels Decl., ¶¶ 3-4, 10; Toca Decl., ¶¶ 3-4, 10.	<p><b>DISPUTED AND INADMISSIBLE</b></p> <p>The entirety of the evidence cited by Glidewell in support of SUF 34 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to dentist declarations Doneff, Bell, Newman, Luke, Cohen, Michiels and Toca) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.</p> <p>The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston</p>

Glidewell's Alleged Undisputed Facts	Keating's Response
	Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
56. Glidewell has consistently used the BruxZir mark for crowns and bridges for over three years, since the launch of the product line in 2009. Shuck Decl., ¶¶ 19-29; Exhibits 8-14, 17-19,21-22, and 24-25 to the Evidence of Appendix.	UNDISPUTED
57. Glidewell has extensively promoted the mark in a wide variety of communication channels. Shuck Decl., ¶¶ 19-29; Exhibits, 8-14, 17-19,21-22, and 24-25 to the Evidence of Appendix .	UNDISPUTED
58. Glidewell has ensured that the BruxZir mark is widely promoted in association with the Glidewell Labs name. Shuck Decl., ¶¶ 13, 19-29; DiTolla, ¶¶ 4-10; Exhibits 7-14, 17-	DISPUTED  Keating does not dispute that the BruxZir mark has been widely advertised however the undisputed

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2	19,21-22, 24-25, and 73 to the Evidence of Appendix.	evidence establishes that it is not necessarily advertised in association with Glidewell Labs.
4		The BruxZir mark does not signify a single source of zirconia crowns and bridges and the zirconia material from which those products are made. Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex 67 at 4:22 – 5:15; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 136; Eggleston Decl., Ex. 137; Jankowski Decl., Ex. 6 (Allred Dep. Tr.), at 141:10 – 143:8; Jankowski Decl., Ex. 5 (Bartolo Dep. Tr.), at 178:11-22, 135:11 – 134:19; Eggleston Decl., Ex. 67, at 3:7 – 5:15.
20	59. This sustained activity has effectively reached the relevant consumers (dentists) and caused them to associate the BruxZir mark with the source of BruxZir products, Glidewell. Doneff Decl., ¶¶ 3-4, 10; Bell Decl., ¶¶ 3-4, 10; Newman Decl., ¶¶ 3-4, 10; Luke Decl., ¶¶ 3-4, 10; Cohen Decl.,	DISPUTED AND INADMISSIBLE  The entirety of the evidence cited by Glidewell in support of SUF 59 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to

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1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	¶¶ 3-4, 10; Michiels Decl., ¶¶ 3-4, 10; Toca Decl., ¶¶ 3-4, 10.	<p>dentist declarations Doneff, Bell, Newman, Luke, Cohen, Michiels and Toca) (filed herewith). The evidence was untimely and therefore under FRCP 37(c) should be excluded.</p> <p>Glidewell has not submitted any admissible evidence regarding the effect of its advertising the BruxZir mark on the relevant consumers. Contrary to Glidewell's contention that its advertising has caused them to associate the mark BruxZir with Glidewell, the relevant consumers (dentists) use the term BruxZir generically for an all zirconia crown. BruxZir is used in the dental industry as a generic identifier for all zirconia crowns. Eggleston Decl., Eggleston Decl., Ex. 65-67; Belton Decl.; Brady Decl.; Campbell Decl.; Colleran Decl.; Jacquinot Decl.; Murphy Decl.; Myers Decl.; Nussear Decl.; Richardson Decl.; Scott Decl.; Stephens Decl.; Sweet Decl.; Tobin Decl.; Frattura Decl.; Ex. A.</p>

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2	60. As discussed in Professor Franklyn's declaration, the BruxZir mark does not exist in a crowded field of similar marks. Franklyn Decl., ¶ 46.	DISPUTED AND INADMISSIBLE
3		The BruxZir mark exists in a crowded field of similar marks. Eggleston Decl., Ex. 121, 114, 122, 124, 125, 126, 123, 129, 135, 130, 131, 127, 128, 132, 133, 134; Jankowski Ex. 99, 103, 109, 112, 119, 43, 101, 96, 93, 31, 28, 27.
4		The entirety of the evidence cited by Glidewell in support of SUF 60 is inadmissible as outlined in Keating's Objections To Evidence Submitted With Glidewell's Motions For Partial Summary Judgment (objections to Franklyn's declaration) filed herewith.
5	61. It is Glidewell's policy and practice to actively protect its mark by, for example, sending cease and desist letters to competitors using confusingly similar marks. Allred Decl., ¶¶ 11-26; Exhibits 62-69 to the Appendix of Evidence.	UNDISPUTED
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1	Glidewell's Alleged Undisputed Facts	Keating's Response
2	62. Glidewell is a leading provider of dental restoration products to dentists. Shuck Decl., ¶ 4.	UNDISPUTED
3	63. Among the products that Glidewell sells are dental crowns and bridges. Shuck Decl., ¶ 4.	UNDISPUTED
4	64. A crown is a type of dental restoration product that completely caps a tooth. Shuck Decl., ¶ 4.	UNDISPUTED
5	65. It is typically bonded to the tooth using dental cement or resin. Shuck Decl., ¶ 4.	UNDISPUTED
6	66. In the past, crowns were principally fashioned either from gold (which has favorable tensile characteristics but is considered aesthetically unappealing by many people) or from porcelain veneers fused to a metal casting (which is aesthetically appealing but tends to crack when subjected to heavy pressure or grinding). Shuck Decl., ¶ 5.	UNDISPUTED
7	67. More recently, dental laboratories began to fashion crowns made of a veneer fused or adhered to a hard	UNDISPUTED

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5 6	ceramic such as zirconia. Shuck Decl., ¶ 5.	
7 8 9 10	68. However, these crowns too tended to crack when subjected to heavy grinding. Shuck Decl., ¶ 5.	UNDISPUTED
11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	69. Beginning in 2005, Glidewell began developing a new type of crown, a solid zirconia crown. Carden Decl., ¶ 2.	UNDISPUTED
11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	70. The advantages of this new monolithic zirconia (or "full contour zirconia") crown were that it would be extremely hard - sufficiently hard to be used in applications requiring a material with high tensile and compressive' strength, including treating patients with "bruxism," a parafunctional activity in which a person repeatedly and habitually grinds his teeth - and that it could be milled from a block of zirconia based on a digital representation of the patient's mouth. Shuck Decl., ¶ 9.	UNDISPUTED
26 27 28	71. The disadvantage was that zirconia is an unattractive material, due to its	UNDISPUTED

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 extreme whiteness and lack of 3 translucency. Shuck Decl., ¶ 10.	
4 72. Ultimately, Glidewell partially 5 overcame the aesthetic challenges of 6 the material, devising a process for 7 fabricating a full contour zirconia 8 crown that was sufficiently appealing 9 that it could be used in a variety of 10 applications. Shuck Decl., ¶ 10.	UNDISPUTED
11 73. In early 2009, Glidewell conceived 12 the name for its new line of monolithic 13 zirconia dental restoration products: 14 BruxZir. Shuck Decl., ¶3; September 15 25, 2012 Deposition of Jim Shuck 16 ("Shuck Depo."); 15:21-16:8, attached 17 Exhibit 83 to Appendix of Evidence.	UNDISPUTED
18 74. The name was chosen in large part 19 because it suggested the primary 20 characteristics of the product: that it 21 was sufficiently strong and durable to 22 be used in a variety of applications, 23 including treating patients with 24 bruxism ("Brux"), and that the material 25 from which the crown was fashioned is 26 zirconia ("Zir"). Shuck Decl., ¶ 9.	DISPUTED  The evidence shows that the name BruxZir was chosen because it describes (rather than suggests) the intended user and its composition of zirconia. (Mangum Decl., Ex. 50 (Shuck Dep. Tr.) at 41:1-13); <i>see also</i> (Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4.), (Jankowski

1	Glidewell's Alleged Undisputed Facts	Keating's Response
2		Decl., Ex. 18; Ex. 4 (DiTolla Dep. Tr.) at 85:15-87:5.) (Mangum Decl., Ex. 52 (Friebauer Dep. Tr.) at 72:1-4.) (Jankowski Decl., Ex. 3 at 6.)
3	75. The product line was launched under the BruxZir mark in June 2009. Shuck Decl., ¶ 7; Shuck Depo. at 15:21-16:8, attached Exhibit 83 to Appendix of Evidence.	UNDISPUTED
4	76. Since its introduction in 2009, the BruxZir line of restoration products (primarily dental crowns and bridges) has been phenomenally popular, generating nearly [Sales data redacted] in revenue from July 2009 through September 2012. Shuck Decl., ¶¶ 40-41; Exhibit 46 to the Appendix of Evidence.	UNDISPUTED
5	77. Glidewell has promoted the product line heavily, investing nearly [Sales data redacted] in advertising its products under the BruxZir mark from June 2009 to June 2012. Shuck Decl., ¶ 39.	UNDISPUTED
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1	Glidewell's Alleged Undisputed Facts	Keating's Response
2	78. Glidewell applied to register the BruxZir mark on June 7, 2009 for use in connection with dental bridges, dental caps, dental crowns, dental inlays, dental onlays, and dental prostheses. Allred Decl., ¶ 3; Exhibits 59-60 to the Appendix of Evidence.	UNDISPUTED  However, Glidewell's statement regarding the filing date is incorrect. Glidewell filed to federally register a trademark in the mark BRUXZIR on June 17, 2009. Boatright Decl., Ex. B.
9	79. The BruxZir mark was registered on the Principal Register on January 19, 2010, as Reg. No. 3,739,663. Allred Decl., ¶¶ 4-5; Exhibits 59-60 to the Appendix of Evidence.	UNDISPUTED
14	80. As noted on the registration for the BruxZir mark, the class of goods and services is "Dental bridges; Dental caps; Dental crowns; Dental inlays; Dental onlays; Dental prostheses." Allred Decl., ¶¶ 3-5; Exhibit 59 to the Appendix of Evidence.	UNDISPUTED
21	81. Glidewell also applied to register the BruxZir mark in connection with another class of goods – dental ceramics - on May 27, 2011; Keating filed an opposition to that application on December 7, 2011, and the case is currently suspended in the Trademark	UNDISPUTED

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1	Glidewell's Alleged Undisputed Facts	Keating's Response
2 3 4 5	Trial and Appeal Board pending the outcome of this action. Allred Decl., ¶¶ 7-8; Exhibit 61 to the Appendix of Evidence.	
6 7 8 9 10 11 12 13	82. In May 2011, after nearly two years of massive advertising and promotional activity by Glidewell under its BruxZir mark, Keating began to offer competing full contour zirconia dental crowns and bridges under the brand "KDZ Bruxer." Shuck Decl., ¶ 15.	DISPUTED  While Keating does not dispute that Glidewell engaged in advertising efforts for its BruxZir products, the use of "massive" is vague in this context in relation to advertising and promotional activity.
14 15 16 17 18 19 20 21 22 23 24	83. Keating's product competes directly with Glidewell's BruxZir product - the products are offered to the same universe of consumers (dentists) through the same marketing channels (e.g., Internet, direct mail, ads in dental industry journals) and at similar price points (\$99 v. \$139). Shuck Decl., ¶¶ 16, 19-29; Exhibits 8-14, 17-19, 21-22, and 24-25 to the Evidence of Appendix.	DISPUTED  Keating's KDZ Bruxer crowns are sold at a price 40% higher than that of Glidewell's BruxZir crowns. This is not comparable. Glidewell SUF 83.
25 26 27 28	84. In a sampling of 22 dentists identified by Keating as KDZ Bruxer customers, nine - i.e., 41% - were	UNDISPUTED

1 Glidewell's Alleged Undisputed Facts	Keating's Response
2 former Glidewell BruxZir customers. 3 Ramirez Decl. ¶ 9; Defendant's Third 4 Amended Initial Disclosures, attached 5 as Exhibit 88 to the Appendix of 6 Evidence.	

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9 **III. KEATING'S RESPONSE TO GLIDEWELL'S CONCLUSIONS OF**

10 **LAW**

11 Keating objects to Glidewell's conclusions of law as argumentative and  
12 as misapplying the applicable Federal law as it relates to the scale of  
13 distinctiveness (i.e. generic, descriptive, suggestive, and arbitrary) and the  
14 considerations of genericness and descriptiveness at issue in this case. The  
15 appropriate standards with the most pertinent supporting case law are identified  
16 by Keating in its Memorandum in Support of its pending Motion For Summary  
17 Judgment Cancelling Glidewell's Trademark Registration (Docket No. 85).

18

19 Respectfully submitted,

20 KNOBBE, MARTENS, OLSON & BEAR, LLP

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22 Dated: Nov. 26, 2012 By: /s/ David G. Jankowski  
23 Lynda J. Zadra-Symes  
24 Jeffrey L. Van Hoosear  
25 David G. Jankowski  
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28 Attorneys for Plaintiff,  
KEATING DENTAL ARTS, INC.